[redacted]

Supreme Court of the United States

[redacted]

Petition for a Writ of Certiorari

OPINION: The questions of fact and law involved in this appeal have been before the District Court on four occasions. That tribunal has answered itself once; and has expressed doubt as to the correctness of its own decisions on the last occasion rendered by it herein.

In the very early days of the controversy (October, 1925), the Receiver, having become acquainted with the fact, through the service of certain motion papers in an action brought by Edward Margolies against the Mercury Holding Company, Inc., in the Supreme Court, Queens County, State of New York, that said Margolies alleged a claim against the Holding Company, applied for an order allowing Margolies' claim, among others, to a Special Master.

Subsequent to the date that the hearing was extended before the Special Master in the early stages of the proceedings, said Margolies was consistently persistent in his contention that he had never filed a claim up and until the 27th day of November, 1925, at which time he asked the United States District Court for the Southern District of New York to make an order permitting him to file a claim. The Court made an order permitting him to file a claim with the Receiver on or before December 7, 1925.

During the period from November, 1925, up to and including the date of the filing of the claim in December, 1925, Edward Margolies was in no degree with the Receiver on many phases of the receivership administration. He joined with others in attempting to put the company into bankruptcy. He also appeared and was successful in that appeal here on order which enjoined him from continuing the prosecution of the Supreme Court action. He was permitted, on his appeal here on order which enjoined him and others from continuing any Supreme Court litigation, to maintain that litigation and submit his claim to a judgment. On that appeal the Circuit Court of Appeals

the Second Circuit held in its opinion rendered after the argument of February 14, 1923, that "a direction will, however, be included in our mandate and in the order to be entered thereupon, that should any judgment be entered in said action in the State Court, such judgment shall not be taken to be a liquidation of any claim filed or capable of being filed under the judgment-debtor's bill herein or in any way affecting the right of the Receiver to contest the claim so entered in judgment or otherwise. Nothing, however, in our mandate shall be taken to prevent the Court below permitting liquidation of Bangalow claims by suit in the State Court should it deem so to do."

On March 19, 1923, the District Court issued its mandate to the District Court. Thereupon Bangalow moved the District Court for an order directing that his claim be liquidated in the action pending in the State Court and the District Court denied that motion.

The claimant Bangalow then proceeded to reduce his claim to judgment in the New York State Court.

On the argument of the appeal from Judge Francis A. Winslow's order, the Receiver's counsel made an offer to stipulate that the Circuit Court of Appeals what attitude he should take in his capacity as counsel for the Receiver with respect to the litigation then pending against the Bangalow Building Company, Inc., in Queens County. The late Judge Charles H. Hough, sitting in motion[illegible] on the bench at that time, was most emphatic in his statement, which Receiver's counsel believed (and believes) to bar the right to take an instruction, that it was none of the Receiver's counsel's business as to what happened in the Supreme Court in Queens County unless the Court below directed him to liquidate Bangalow claims in that court.

The claimant Bangalow still pursued his Supreme Court remedy after the opinion of the Court above quoted, and obtained a default judgment in Queens County. It is now

merely that this judgment was for Fifty odd thousand Dollars and that the original claim of Margolies was for one hundred seventy four thousand Dollars, despite the fact that the judgment was obtained by default on request. Immediately upon entering this judgment the claimant moved the Circuit Court for a recall of its mandate. The motion then came before the Circuit Court again and the Court denied the motion and counsel for the Receiver especially admits that that motion for recall was tantamount to a motion for reargument of the case as a whole.

Margolies then had made up a copy of the judgment roll and served it upon the Receiver. The Receiver rejected it. Margolies then brought on a hearing on his claim before the Special Master. The Special Master stated that the claim was not before him since the position of the claimant was inconsistent. In other words, the Special Master held that if Margolies had not filed a claim and was not to be considered a claimant at the time the Receiver referred the Margolies claim to him, it was now too late, under the terms of the order of limitation made by the United States District Court for the Southern District of New York, for Margolies to file his claim with the Receiver. Margolies, however, made a motion to open his default before Judge Winslow of the District Court and that motion was granted.

The Special Master followed the opinion of the Circuit Court, which was rendered herein and from which we have quoted above. In these proceedings, as appears from the record, the Receiver elected to try out the issue de novo and the Special Master found that under the Circuit Court's ruling the judgment should not be considered "as in any way affecting the right of the Receiver to contest the claim as entered to judgment de novo."

There was no question at the hearing before the Special Master as to the correctness of the claimant herein. The

claimant's counsel and his associates were present and were very frank and very sincere in their statements that it was their express intention to test out the questions involved in the proceeding in the United States Supreme Court. The judgment was offered as proof of the claim and claim and upon such proof, and there being no intervention, opposition or attempt on the part of the claimant to make any further proof, the claim was dismissed upon the interlocutory opinion of the Circuit Court of Appeals.

Upon this dismissal an order was entered by the United States District Court for the Southern District of New York and the said Court below confirmed the report of the Special Master which by its terms dismissed the Mangolino claim. Thereupon the claimant, Edward Mangolino, again appealed to the Circuit Court. Thereupon, in an opinion rendered by Judge Thomas W. Swan, the Circuit Court reversed itself and stated that its former opinion rendered herein *per curiam*, to the effect that the judgment of the New York Supreme Court "should not affect the right of the Receiver to contest the claim *de novo* was improvidently made." The word "improvidently" is defined in all of the standard dictionaries as "exercising foresight or forethought; cautious." There was also a notation at the bottom of this opinion by Judge Swan to this effect: "Note: The learned Judge Hough did not see this opinion. He dissented from the conclusion and thought the order should be affirmed." A copy of Judge Swan's opinion is annexed hereto for the convenience of this Honorable Court. Upon this opinion of Judge Swan, Judge Winslow was constrained to make an order (Record, p. 31) whereby he instructed and in fact directed the Special Master to accept the judgment roll which represented the recovery of the Mangolino judgment against the Bowers Building Company, Inc., in the Supreme Supreme Court of the State of New York, County of Queens. He then

Held, before whom the claim of Mr. Edward Margulies was then brought on for hearing, found, pursuant to the instructions and, we might say, the commands laid upon him by this order of Judge Winslow, that the judgment of Mr. Margulies was conclusive upon the Receiver and denied the Receiver's counsel the right to introduce any evidence which would in any way tend to show that the claim of Mr. Margulies was less in amount than was indicated by this judgment which he had obtained by default in Queens County in the State of New York. The report of the Special Master was confirmed by an order of the District Court (Record, p. 32), and from this order and the intermediate order (Record, p. 30), which for all practical purposes compelled the Special Master to make his report as he made it, the Receiver appealed, and by his appeal asked the Court to review itself again and was emboldened to make review by the fact that that Court having reviewed itself once, might have, and should have, reviewed itself again, to the end that order and logic might be maintained and that there be not injected into the realm of equity proceedings a doubt as to whether there should ever have been such an institution as an equity receivership created by virtue of the power that Equity has vested in District Courts.

On that appeal the Circuit Court refused to again review itself, but it did, *per curiam*, render this somewhat remarkable opinion:

"CIRCUIT COURT OF APPEALS,

Second Circuit.

May 7, 1928.

No. 294.

Hatch v. Warners Holding Co., Inc.
Ex parte Margulies.

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges.

Per Curiam. A majority of the court, as it is now constituted, think that our first decision impairs the jurisdiction of the District Court over assets already in its custody when the judgment of the state court was entered. They believe that the liquidation of claims is a part of the distribution of the estate, since it determines how much each creditor shall get, and that the distribution of the estate is part of what is usually understood as jurisdiction over the res. However, the former decision was reached after unusual deliberation and full presentation of all the questions involved. If it is to be changed, only the Supreme Court can do so; in the same case and on the same claim the first ruling must stand.

"Order affirmed."

Petitioner submits that no more compelling reasons could exist for the making of his petition than are revealed by the facts hereinabove set forth. It is instantly apparent from a reading of the Circuit Court's last opinion that

that tribunal, while hesitant to certify the question of law involved, is certainly desirous of having the question passed upon by this Court.

The Circuit Court concedes by Judge Swan's opinion (the second written opinion) that the Receiver of the Kansas Building Company, Inc., and his counsel were in effect directed to disregard the pending action, which the claimant, Sturgeon, had brought in the New York State Supreme Court, in the County of Queens. The opinion also concedes that the master and the District Court followed the directions of the Circuit Court of Appeals. It is apparent, therefore, that the judgment which Sturgeon obtained in the State Court was founded upon his uncontradicted testimony, and the record on appeal in this case shows that the suit which Sturgeon had brought was for the recovery of damages amounting to $[illegible] the judgment was for approximately $[illegible]. It is also apparent that there may be as great a discrepancy between the amount which Mr. Sturgeon would prove if his claim were restored and the amount which he recovered and the amount which he obtained. His action was brought on contract and, therefore, his damages, we may assume, were liquidated at the time the action was brought. The result is that Sturgeon is entitled to be paid out of the assets in the receivership estate the amount which he himself claimed was due him when the matter was first before Mr. Justice Cooper, while all the other creditors of the receivership estate are subjected to the necessity of proving their claims under diligent investigation, inquiry, and, if the occasion demands it, cross-examination on the part of the Receiver. The effect of the Circuit Court's decision is, therefore, clearly inconsistent with its plain intent to still keep Sturgeon within the receivership proceedings and to still permit the amount of claim by the use of the

> the jurisdiction of the appointing court the control of its assets, so far as persons having claims to participate in such assets are concerned, and such persons must go into that court to prove their demands and receive their share of the estate."

The case of *White* v. *Ewing*, 159 U. S. 36, 39, is cited in support of that statement. The Circuit Court, however, then went on to say:

> "But this does not mean that all actions which are pending against the debtor whose property has been taken under receivership must be stayed. The orders of the receivership court which result in a distribution of assets have in reality a two-fold aspect. First, the court determines the existence and amount of the indebtedness owing to the creditor-claimant at the time when the debtor's property was taken under receivership. Allowance of a claim is an adjudication of this issue and is equivalent to a judgment in *personam* against the debtor."

The Circuit Court then made this statement, the purpose of which we humbly submit is not comprehended by us:

> "This is the more obvious when the claim is liquidated in another court by *consent of the receivership court*."

There is no possibility that the Circuit Court was under any misapprehension that the receivership court consented to the liquidation of this claim in another court. But we call attention to this statement in contemplation of the fact that there might have been some misunderstanding on the part of the Circuit Court regarding the circumstances under which the judgment in the State Court was secured. Following the foregoing statements the Circuit Court in its opinion arrives at the very sound conclusion that the net result of "receivership suit" procedure is the issuance

of a decree "*in rem*." The Circuit Court also says "it is equivalent to an execution against the assets to satisfy the judgment *in personam*." The learned Court, however, departs from this sound conclusion, in our humble opinion, when it endeavors to distinguish a suit "to establish a lien upon, or affect possession of, the property which the Federal Court had previously taken under receivership." We submit that the learned Court has overlooked the fact that the very moment the Federal Court takes into its possession assets of the corporation in receivership *every claim subsequently proven becomes a claim in rem*. Here, we believe, rests the reason for the great confusion that has unfortunately surrounded the question involved. The very moment that the United States Court takes into its possession by due process of law, the assets of a corporation in receivership proceedings (which we commonly refer to as a conservation suit), actions *in personam* disappear. The situation then becomes inconsistent with such actions. The United States Court says, in effect: "We have certain assets of this party, who you claim owes you some money, and in so far as these assets are concerned (and no further) you may come in here and file your claim—*your lien*—against these assets. With respect to any other assets that this party may own, we have no interest. We have taken these particular assets because we believe that our intervention will save these assets from dissipation and will effect equity among all of you people who claim an interest therein." In other words, if we interpret the law, and the underlying theory, correctly, the United States Court *issues a blanket execution* and its receiver (as a marshal or sheriff might do) *goes out and levies upon all the property he can find*. Thereafter, claimants who contend that the receivership estate owes them money may come in and file their particular lien against the assets. If, upon inquiry, the receiver finds that

that lien is based upon a valid claim, he so informs the Court and then the individual is given his portion of the whole. We are, of course, using the word "lien" here for the purpose of illustrative argument.

Again, we repeat, that it is in this particular pit of confusion that 90 per cent. of the decisions must fall when properly analyzed.

To continue our argument, we will say, that the Circuit Court has in its statements approached closely the same state of confusion, since it has in effect stated that the allowance of a claim in these equity proceedings is in its nature a decree *in rem*, and in the same breath stated that a distinction should be drawn between suits *in rem* and suits *in personam*.

If Section 265 of the Judicial Code prohibiting the issuance of an injunction by the United States Court, which enjoins actions in the State Court, applies to one type of State Court suit, it must apply to all types. Therefore, the statement in the Circuit Court's former opinion to the effect that "If the state suit seeks to establish a lien upon, or affect possession of, the property which the federal court had previously taken under receivership, the state suit will be stayed," is an erroneous statement of law. It makes no difference what the nature of the suit may be—any decision to the contrary is an unsound one. The only question involved is, who had prior jurisdiction over the assets, and a suit brought in a State Court *to enforce a lien may just as properly go to judgment after the receiver has been appointed as one which merely seeks a judgment in personam*. If, however, the State Court judgment establishing the lien is submitted to the United States District Court, the United States District Court will say: "There is nothing you can do with that judgment to-day. We are in possession of this property and we are administering it." If perchance, it would ap-

pear that counsel in this petition is arrogating to himself the position of an authority, counsel would merely state that he is, to the best of his ability, for the purposes of this petition only, analyzing all decisions which have come to his attention and that he is basing his conclusions largely upon the fact that there is such a recognized thing as Equity Receiverships. The allegations essential in a creditor's bill would be futile mouthings if the law were otherwise than as counsel has above submitted. The decree appointing the receiver would be a futile gesture. It is to eliminate the multiplicity of actions, the diversity of forums, the conflict of laws and the confusion resulting from the helter-skelter activities of attorneys from Bangor, Maine, to Tallahassee, Florida, that the United States Courts have permitted themselves to take possession of assets and thereafter administer them.

It, therefore, appears most conclusively that assuming, as we must assume, the right of the United States Court to take possession of these assets, thereafter *every proceeding is a proceeding in rem*. This must be so because the allowance of a claim, and a dividend of 10 per cent. paid thereon in the equity proceeding, *would not bar the claimant from recovering the other 90 per cent. in the event that the receivership were suddenly lifted*. The payment of a claim in a receivership proceeding is not a payment *pro tanto*. It could not be. There might suddenly turn up, after the receivership had been wound up, millions of dollars of oil lands in a section of the country far removed from the site of the receivership activities. *This would not result in the deprivation of creditors' rights and the sudden rise to affluence of stockholders*. The Circuit Court has properly found that the allowance of a claim in equity proceedings is in the nature of a decree *in rem*, but it has, in our humble opinion, erroneously found that there is any distinction between proceedings initially brought *in rem*

and initially brought *in personam*. Any decsion holding that one suit may go on "concurrently" while another may not, is a decision based on error. All that the framer of such a decision could possibly mean is that the futility of the proceeding *in rem* in the State Court is instantly apparent, while the hope exists that "the full faith and credence" provisions of our Constitution and statutes will make of some value a State Court judgment.

The statements contained in the second of the Circuit Court's opinions (Judge Swan's opinion):

> "Since the appellant was entitled to prosecute his suit, we believe that the judgment roll is entitled to the same credence as federal courts are required to give state judgments in other suits"

and

> "While the judgment roll is conclusive as to the amount found owing to the appellant by the defendant corporation on June 10, 1923,"

and

> "The text writers on the subject have accepted without dissent the doctrine that the judgment is conclusive as to the amount of the debt"

are all so inconsistent with the statements which we have heretofore quoted and which, for the sake of emphasis, we quote again—

> "The judgment creditor must still establish to the satisfaction of the equity court that he is a creditor of the defendant and he must still secure an order entitling him to share in the assets of the receivership"

that we believe the Supreme Court should review this question.

THIRD: A certified copy of the entire record of said case in the said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application, and marked Exhibit A, in compliance with Rule 35 of this Honorable Court.

FOURTH: Your petitioner is advised and believes that the judgment of affirmance (entered upon the authority of its said opinion) of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240, Judicial Code.

FIFTH: That the said case was decided in said Circuit Court of Appeals adversely to the interests of those whom the petitioner, as Receiver, represents. That by reason of this decision the Receiver is bound by a *default judgment* for a large sum of money. Furthermore, the Circuit Court of Appeals is itself responsible for the fact that the creditors of the Morosco Holding Company, Inc. (other than the claimant Margolies himself), were not permitted to submit any defense or subject Margolies to any inquiry in the proceedings wherein he secured this large judgment. The question for review is clear, concise and important. In the absence of a direction to liquidate a claim in a forum other than the court of his appointment, is a receiver in equity bound by a judgment secured at a time subsequent to the appointment of the receiver by a creditor who has commenced an action in a state court prior to the appointment of the receiver? In an attempt to vindicate his refusal to appear before a special master, the claimant Margolies has had much to say with respect to his constitutional rights. Petitioner submits that no constitutional question is involved. The Circuit Court of

Appeals in its *first* opinion herein permitted Margolies to proceed to reduce his New York State suit to a judgment and told him when such permission was granted that his judgment would not be taken "as in any way affecting the right of the Receiver to contest the claim so reduced to judgment *de novo*." The Circuit Court, having thereafter come to the opinion that its prior conclusion to the effect that the Receiver might contest the claim *de novo in so far as the assets in his hands were applicable to payment of claims* "was improvidently made," forced the Receiver into a position from which he could not extricate himself. The third, and last, written opinion of the Circuit Court clearly indicates, however, that that Court as then constituted now believes its *second* decision (referred to as "our first decision") "impairs the jurisdiction of the District Court over assets already in its custody *when the judgment of the State Court was entered*." (Italics ours.)

Petitioner submits that the question submitted for review (1) has never been the subject of independent deliberation by this Court; (2) has become a subject of confusion in many of the District Courts; (3) is a question upon which the Circuit Court for the Second Circuit undoubtedly desires enlightenment; (4) is a question which remains in doubt in the Second Circuit; and (5) is a question which should be reviewed by this Court by reason of the unusual circumstances obtaining in connection with the rights of those represented by the petitioner. If the decision of the Circuit Court is not reviewed, it is apparent that those affected here may be the only interests to suffer the results of this decision. The Circuit Court makes itself clear to the effect that this decision probably will affect only this case and this claim. That Court said: "If it (the adverse decision) is to be changed, only the Supreme Court may do so; in the *same* case on the *same* claim the first (Judge Swan's—really the second ruling) ruling must stand."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Robert L. Hatch v. Morosco Holding Co., Inc. (Ex parte Margolies), No. 284, to the end that said case may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

JOHN MARTIN RIEHLE, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the contents thereof; that the same are true to his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true.

JOHN MARTIN RIEHLE.

Sworn to before me this
11th day of August, 1928.

ANTHONY F. PAURA,
Notary Public,
Kings County.
Cert. filed in N. Y. County, 352.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Robert L. Hatch v. Morosco Holding Co., Inc. (Ex parte Margolies), No. 284, to the end that said case may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

.....John Marlon Ashley.....

Petitioner.

HARRY F. WHITE,
Attorney,
420 Union Trust Building,
Washington, D. C.

The following is a copy of Judge Swan's opinion referred to in this petition. It is the *second* written opinion rendered by the Circuit Court of Appeals. The opinion upon which the order of affirmance, review of which is sought, was entered is the *third* opinion.

Before: HOUGH, MANTON and SWAN, Circuit Judges.

Appeal from an order entered by the District Court for the Southern District of New York disallowing the claim of Edward Margolies, the appellant.

NATHAN BURKAN, Esq., Attorney for Appellant.
F. WRIGHT MOXLEY, Esq., Attorney for Receiver, Appellee.

SWAN, Circuit Judge:

For an understanding of the problems presented by this appeal it is necessary to state with some detail the preceding steps in this protracted litigation.

In May, 1923, appellant brought suit on a contract against the Morosco Holding Company, a Delaware corporation, in the Supreme Court of Queens County, New York. The defendant appeared and, the issues having been joined, the case was in June noticed for trial at the term to be held in October, 1923.

In July, 1923, a creditors' bill was filed by Robert L. Hatch against Morosco Holding Company in the District Court for the Southern District of New York. A receiver was appointed, and thereafter orders were entered re-

straining the prosecution of suits against the defendant and directing creditors to file their claims with the receiver. Copies of these orders were served on appellant, and his suit in the state court was stayed.

In February, 1924, appellant petitioned the District Court for leave to prosecute his suit in the state court. From an order denying his petition, an appeal was taken to this Court which reversed the order as being in violation of Section 265 of the Judicial Code. The opinion appears in 5 Fed. (2d) 1015, and concludes as follows:

> "A direction will, however, be included in our mandate and in the order to be entered thereupon, that should any judgment be entered in said action in the state court, such judgment shall not be taken to be a liquidation of any claim filed or capable of being filed under the judgment creditors' bill herein, or as in any way affecting the right of the receiver to contest the claim so reduced to judgment de novo. Nothing, however, in our mandate shall be taken to prevent the court below permitting liquidation of Margolies' claim by suit in the state court should it prefer so to do."

After the mandate was issued, the appellant moved in the District Court that the receiver be directed to liquidate appellant's claim in the state suit then pending. This motion was denied. Appellant then caused his state suit to be reinstated upon the trial calendar, and served formal notice thereof upon the receiver and upon the attorney of record for the defendant in said suit. When the case was reached for trial, neither the receiver nor the defendant appeared, and the defendant was defaulted. Proof was made by the appellant, and the state court made findings of fact and of law and entered judgment in his favor for some $55,000 and costs.

After this judgment was obtained, the appellant moved in this court that its mandate be recalled and corrected so that the receiver be not permitted to try de novo the issues of appellant's claim. This motion was denied.

Immediately thereafter the appellant filed in the receivership proceedings its verified proof of claim. The District Court held that he was not too late and ordered a hearing to be had before the special master. The appellant to litigate his claim in the state court, but we told the judgment roll, and rested. The receiver stated that he elected to have the claim tried de novo. The master reported with a recommendation that the claim be dismissed on the opinion of this court. The District Court confirmed the report, and ordered that the appellant's claim be disallowed and dismissed.

The action of the master and of the District Court followed the directions given by this court when the case was formerly before us. Our decision permitted the appellant to litigate his clai min the state court, but we told him, in substance, that the judgment which he might thus obtain would be of no avail to him in the receivership proceedings. The present appeal asks us, in effect, to reconsider this statement as to the limitation upon the effect to be given the state judgment.

It is elementary that the judicial appointment of a receiver for an insolvent corporation draws to the jurisdiction of the appointing court the control of its assets, so far as persons having claims to participate in such assets are concerned, and such persons must go into that court to prove their demands and receive their share of the estate. White v. Ewing, 159 U. S. 36, 39. But this does not mean that all actions which are pending against the debtor whose property has been taken under receivership must be stayed. The orders of the receivership court which result in a distribution of assets have in reality a

two fold aspect. First, the court determines the existence and amount of the indebtedness owing to the creditor-claimant at the time when the debtor's property was taken under receivership. Allowance of a claim is an adjudication of this issue and is equivalent to a judgment in personam against the debtor. This is the more obvious when the claim is liquidated in another court by consent of the receivership court. Second, the court determines the time and the manner in which payment out of the receivership assets shall be made to the creditor whose claim has been allowed. This is in its nature a decree in rem; it is equivalent to an execution against the assets to satisfy the judgment in personam. Bearing in mind this two fold aspect of the receivership, it is easy to classify the federal cases in which injunctions have been granted or refused against maintaining suits in state courts. If the state suit seeks to establish a lien upon, or affect possession of, the property which the federal court had previously taken under receivership, the state suit will be stayed. If, however, the state suit seeks only a judgment in personam, the two may go on concurrently. Oppenheimer v. San Antonio Land &c. Co., 246 Fed. 934 (C. C. A. 5); In re Tyler, 149 U. S. 164; Kline v. Burke Constr. Co., 260 U. S. 226; Lion Bonding Co. v. Karatz, 262 U. S. 77; Havner v. Hegnes, 269 Fed. 537 (C. C. A. 8); International & G. N. Ry. Co. v. Adkins, 14 Fed. (2d) 149 (S. D. Tex.). The prosecution of the pending state suit seeking only a judgment in personam against the defendant corporation did not impair the jurisdiction of the federal court, and, as we held on the former appeal, could not be stayed.

The question remains what effect shall the receivership court give to the state judgment. The judgment creditor must still establish to the satisfaction of the equity court that he is a creditor of the defendant and he must still

secure an order entitling him to share in the assets of the receivership, if any remain undistributed. The question is really one of making proof.

In several cases it has been held that the judgment is conclusive evidence of the existence and amount of the indebtedness. Pine Lake Iron Co. v. LaFayette Car Works, 53 Fed. 853 (C. C. Ind.); Mercantile Trust Co. v. Pittsburgh & W. R. Co., 29 Fed. 732 (C. C. W. D. Pa.); Pringle v. Woolworth, 90 N. Y. 502; Gray v. Taylor, 59 N. J. Eq. 621; St. Louis &c. Ry. v. Green, 183 S. W. 829, 833 (Tex. Civ. App.). The only case which has been found contra is Evans v. Illinois Surety Co., 319 Ill. 105. This decision was rested upon the authority of cases which hold that where the receivership proceedings effect a judicial dissolution of the corporation, a subsequent judgment against it has no force. This is not the situation involved here nor in the other cases above cited. The Illinois decision appears to have confused the two situations and ignored the recognized distinction between them. The text writers on the subject have accepted without dissent the doctrine that the judgment is conclusive as to the amount of the debt though not as to the time or mode of payment. Alderson's Beach on Receivers, Sec. 486; High, Injunctions (4th Ed.), Sec. 318; Tardy's, Smith on Receivers (2d Ed.), Sec. 29.

A somewhat analogous situation is found in cases construing Sec. 66 of the Judicial Code, which gives the right to sue the receiver in respect to his own acts in carrying on business, without previous leave of the equity court—the section concluding with the sentence,

> "But such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

In Willcox v. Jones, 177 Fed. 870 (C. C. A. 4), the receiver was sued in a state court by the administratrix of an engineer employed by the receiver. Judgment was obtained, and the judgment creditor then intervened in the receivership suit, asking for payment of the judgment. On the hearing of the intervening petition, the receiver contended that the judgment was not conclusive and that the equity court had power to inquire de novo into the justice of the cause by virtue of the above quoted proviso of Sec. 66. The court rejected this contention because to so hold would render useless the suitor's right to sue in another court. The proviso was held to be intended to leave the receivership court in undisputed control of the property with power to adjust equities and priorities between claimants. The court quoted the words of Caldwell, J., in Central Trust Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551 (C. C. Ark.):

> "The judgment of the state court is conclusive as to the amount of the debt, but the time and mode of its payment must be controlled by the court appointing the receiver."

See in accord, Dillingham v. Hawk, 60 Fed. 494 (C. C. A. 5); Manhattan Trust Co. v. Chicago Elec. Tr. Co., 188 Fed. 1006 (C. C. Ill.); Am. Brake Shoe Co. v. Pere Marquette R. Co., 263 Fed. 237, s. c. 278 Fed. 832; Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 103.

We believe that the cases are rightly decided which apply the same rule to a judgment rendered against the debtor whose property was taken into receivership after the state court had acquired jurisdiction of the parties. To say that Sec. 265 of the Judicial Code prevents the receivership court from staying the state suit but that it may, nevertheless, litigate de novo the very issues decided by the state court, makes of very little value the privi-

lege which that section confers on suitors to continue pending actions. It would be giving the empty shell but retaining the kernel. The federal courts will not entertain the suggestion that their receivers will not obtain justice in the state courts. No end would be served by trying the claim de novo. Since the appellant was entitled to prosecute his suit, we believe that the judgment roll is entitled to the same credence as federal courts are required to give state judgments in other suits. (Rev. Stat., Sec. 905; Galpin v. Page, Fed. Cas. 5206.)

The right of a creditor to continue a pending suit in a state court and to use the judgment in the receivership as conclusive of the fact and amount of indebtedness, will probably not be availed of with great frequency because of the danger that delay in securing the judgment may cause the claimant to be too late to share in the distribution under the receivership. The equity court may, of course, administer the property within its control without regard to creditors whose claims have not been proved and allowed by it. See, Penn. Steel Co. v. N. Y. City Ry. Co., 229 Fed. 120 (C. C. A. 2).

While the judgment roll is conclusive as to the amount found owing to the appellant by the defendant corporation on June 10, 1923, the judgment allows interest from that date until the date of its entry. The date to which interest is to be allowed on claims of creditors sharing in the receivership assets is a matter to be settled by the receivership court. Thomas v. Western Car Co., 149 U. S. 95. The appellant should fare no better in respect to interest by reason of his judgment than he would were his claim proved by other evidence. The proper rebate of interest in favor of the receiver may be made upon the allowance of appellant's claim. Gray v. Taylor, supra. As to costs, see Pine Lake Iron Co. v. LaFayette Car Works, supra.

For the reasons above stated, we believe the direction in our former mandate to the effect that any judgment which the appellant might obtain in his action in the state court should not affect the right of the receiver to contest the claim de novo was improvidently made. The order of the District Court is, therefore, reversed and the cause remanded for further proceedings consistent with this opinion.

Note: The late Judge Hough did not see this opinion. He dissented from the conclusion and thought the order should be affirmed.